

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of BRANDON NELSON  
BORDINAT, Minor.

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

BRANDON NELSON BORDINAT,

Respondent-Appellant.

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UNPUBLISHED

October 19, 2006

No. 261116

Oakland Circuit Court

Family Division

LC No. 2004-689281-DL

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right from an order adjudicating him guilty of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). We affirm.

Respondent first argues that a new trial is required because the trial court erroneously limited his expert's testimony at trial. Respondent raised this issue at trial and also in a motion for a new trial, which the trial court denied. The decision to admit or deny expert testimony, as well as the decision concerning a motion for a new trial, falls within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Wilson*, 194 Mich App 599; 602; 487 NW2d 822 (1992). In this case, we find no abuse of discretion.

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case.” *People v Coy*, 243 Mich App 283, 294-295; 620 NW2d 888 (2000).

Although respondent argues that his expert witness, Dr. Katherine Okla, was prohibited from testifying about interviewer bias and hypothesis testing, the record discloses that Dr. Okla testified about each of these subjects. The expert witness was not permitted to testify about certain research studies concerning normative childhood development, the potential for taint from improper interview techniques, and patterns of disclosure of sexual abuse and memory, or possible motives for false allegations. However, the victim’s disclosure in this case was made immediately after the alleged incident, and there was no suggestion that it arose from improper motives. Under the circumstances, the trial court did not abuse its discretion in determining that the excluded testimony would not have assisted the jury in understanding the facts.

We disagree with respondent’s claim that the prosecutor mischaracterized Dr. Okla’s testimony during closing argument. Because respondent did not object to the prosecutor’s remarks, he must demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). In her testimony, Dr. Okla was asked whether Amy Allen, a forensic interviewer, violated established protocol when she interviewed the victim. Dr. Okla stated that there were some things that could have been outside the usual protocol, but cited only the fact that there were some repeated questions. In his closing argument, the prosecutor stated that Dr. Okla had testified that, but for “a couple things,” Allen substantially complied with the protocol. The prosecutor’s remarks were fair comments on the evidence, *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001), and did not amount to plain error.

Next, respondent argues that the prosecutor engaged in other misconduct during closing and rebuttal arguments that denied him a fair trial. Again, respondent did not object to the prosecutor’s remarks, so our review is limited to plain error. *Carines, supra*.

Questions of misconduct by the prosecutor are decided case by case. This Court examines the pertinent portion of the record and evaluates the prosecutor’s remarks in context to determine whether respondent was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Respondent argues that the prosecutor improperly disparaged defense counsel, made improper appeals to sympathy, and argued facts not in evidence.

A prosecutor may not engage in arguments that attack defense counsel because such arguments undermine the defendant’s presumption of innocence and unfairly shift the jury’s attention from the evidence to defense counsel’s personality. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). Moreover, appeals to sympathy are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Nor may a prosecutor make a statement of fact to the jury that is unsupported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, an otherwise improper remark may not arise to error requiring reversal when the prosecutor is responding to defense counsel’s arguments. *Watson, supra* at 593.

In this case, the prosecutor's comment that he did not know what planet defense counsel was on during the trial was responsive to defense counsel's space ship analogy during closing argument. The remark that defense counsel was "defending some other case than what's being charged here" was made in the context of responding to defense counsel's argument that there was no credible evidence that respondent performed oral sex on the victim. The prosecutor pointed out that respondent was not charged with that conduct. The prosecutor did not improperly accuse defense counsel of intentionally trying to trick the five-year-old victim, but was merely arguing that it would not be difficult to confuse such a young child. The prosecutor's brief comment that the victim did not receive a break from respondent was responsive to defense counsel's remark that the victim should not be afforded any breaks because he was a child. Similarly, the prosecutor's brief explanation for why Officer Harrison was not called as a witness was responsive to defense counsel's suggestion in her closing argument that the prosecutor deliberately chose not to call Officer Harrison because she would not be helpful to the case. In sum, the prosecutor's remarks, viewed in context with defense counsel's closing argument, did not amount to plain error. Further, any prejudice that may have arisen was cured by the trial court's instructions that the attorney's statements were not evidence. Thus, respondent's substantial rights were not affected. *Carines, supra*.

Next, respondent argues that the trial court erred in denying his request for production of the victim's counseling records with Dr. John Pietrofessa. We disagree. This Court reviews a trial court's decision regarding discovery requests for an abuse of discretion. *People v Fink*, 456 Mich 449, 458, 574 NW2d 28 (1998).

Respondent does not dispute that the victim's counseling records are privileged. In *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994), the Court held that where a defendant can demonstrate a good-faith belief, grounded in articulable fact, that there is a reasonable probability that the privileged documents contain material information necessary to his defense, a trial court must conduct an in camera review of the records to ascertain whether they contain evidence that is reasonably necessary to the defense.

In this case, respondent merely made a generalized assertion that the victim's counseling records were necessary because they would be probative of the victim's credibility. A defendant's generalized assertion of a need to attack the credibility of his accuser does not establish the threshold showing of a reasonable probability that the records contain material information sufficient to overcome the relevant statutory privilege. *Id.* at 650. Thus, the trial court did not abuse its discretion in denying respondent's request for production of the counseling records or an in camera hearing.<sup>1</sup>

Next, respondent argues that the trial court abused its discretion by allowing the victim's older brother to testify about a similar incident involving respondent. We disagree.

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<sup>1</sup> Respondent requests that this Court review the counseling records in camera. But because respondent failed to make the threshold showing of a reasonable probability that the records contain information material to his defense, an in camera inspection by this Court is not warranted.

The admissibility of prior bad acts evidence is within the trial court's discretion, and its decision will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) governs the admission of evidence of other bad acts. The rule provides, in pertinent part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

In this case, the evidence was offered to prove respondent's scheme, plan, or system in committing a sexual assault against his neighbors. In *People v Sabin (After Remand)*, 463 Mich 43, 62; 614 NW2d 888 (2000), the Court considered the "scheme, plan, or system" language in MRE 404(b)(1) and stated that "evidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." The Court clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 63. Further, logical relevance "is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Id.* at 63-64, n 10. Also, relevant similar acts are not limited to circumstances in which the charged and uncharged acts "are part of a single continuing conception or plot." *Id.* at 64. The Court explained that the evidence of other acts "'must indicate the existence of a plan rather than a series of similar spontaneous acts,'" but unlike evidence of other acts used to prove identity, "'the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Id.* at 65-66.

In this case, the uncharged prior conduct and the charged conduct were sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. The trial court did not abuse its discretion in allowing the testimony. Moreover, in light of the trial court's cautionary instruction that the jury could consider the evidence only for the limited noncharacter purpose and could not consider whether it showed that respondent was a bad person or is likely to commit crimes, the probative value of the testimony was not substantially outweighed by the potential for unfair prejudice.

Respondent also maintains that the trial court erred in admitting the testimony because the witness was not legally competent to testify. This claim fails as well. This Court reviews a trial court's determination of a child witness's competency for an abuse of discretion. *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). All persons are presumed competent to testify. *Id.* Where competency is challenged, the trial court must question the witness to determine whether the witness knows the difference between the truth and a lie, and understands the duty to do the former. MRE 601; *Watson, supra* at 583. In this case, the witness demonstrated that he knew the difference between the truth and a lie by answering various questions, and promised to tell the truth when testifying. The trial court did not abuse its discretion in finding that the witness was competent to testify. Any subsequent contradictions in the witness's testimony affected only the weight of the testimony, not his competency to testify. *Coddington, supra* at 597.

Finally, respondent argues that the trial court erred in denying his request for an evidentiary hearing to explore the possibility that repeated interviews affected the victim's ability to truthfully testify. We disagree. A trial court's decision whether to conduct an evidentiary hearing on a matter is reviewed under an abuse of discretion standard. *Bielawski v Bielawski*, 137 Mich App 587, 592-593; 358 NW2d 383 (1984).

Here, so called "taint" hearings are not required in Michigan. Further, the trial court was apprised of the fact that the initial allegations of abuse arose spontaneously, rather than in response to questioning. Moreover, respondent made no actual showing that the interview techniques used were coercive or suggestive. Under the circumstances, the trial court did not abuse its discretion in determining that an evidentiary hearing was not warranted.

Regarding the victim's competency to testify at trial, the trial court's questioning of the child revealed that he knew the difference between the truth and a lie. The trial court did not abuse its discretion in determining that the victim was competent to testify. *Watson, supra* at 583.

Affirmed.

/s/ Christopher M. Murray  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood